

MALAYSIAN REPORTS

Ng Thian Soong v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL
APPEAL NO 33 OF 1987
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND
JEMURI SERJAN SCJJ
14 MARCH 1990

Criminal Procedure — Trial by jury — Foreman informing judge that jury had reached a decision by majority of four to three — Judge asking jury to retire and reconsider their verdict — Judge justified in doing so as jury not functus officio

Criminal Procedure — Direction to jury — Circumstantial evidence — No notice of alibi defence — Bare denial of accused excluded — Criminal Procedure Code (FMS Cap 6), ss 204(ii), 228, 234 & 402A

Evidence — Circumstantial evidence — Proof beyond reasonable doubt — Necessity to direct jury adequately — Evidence Act 1950, s 114 illus (a)

The appellant had been tried by jury and found guilty of murder by a majority verdict of five to two and he was convicted and sentenced to death. On his appeal, three major arguments were raised and considered: (a) at the trial, after the jury had retired to consider their verdict at 5.57pm, the foreman informed the judge at 8.08pm that the jury had come to a four to three decision whereupon the learned judge asked the jury to retire again for further consideration. It was only after the jury had retired for the second time that they returned a verdict of guilty of murder of a majority of five to two to which the learned judge concurred. It was argued that since the jury had already decided by a majority of four to three in the first instance, they became functus officio and as such the verdict by which the accused was found guilty was a nullity. It was also alleged in the petition of appeal that the learned judge had pressured the jury to come to a verdict by telling them they would have to stay the whole night until a verdict was reached; (b) the direction given to the jury on the subject of circumstantial evidence to connect the accused with the crime of murder was inadequate or insufficient; (c) the learned judge was wrong in ruling that the evidence of bare denial by the accused should be on the ground that it constituted a defence of alibi and therefore was not admissible in the absence of notice served on the prosecution under s 402A of the Criminal Procedure Code (FMS Cap 6) ('CPC').

Held, allowing the appeal of the accused:

(1) Since s 204(ii) of the CPC expressly requires that a majority verdict of the jury must not be less than five to two, anything less cannot constitute a verdict in law. Accordingly, when the jury had indicated that they had reached a decision by a majority of four to three, the learned judge was perfectly entitled to resolve the deadlock by requiring them to retire for further consideration under s 228 of the Criminal Procedure Code. The functus officio argument is therefore wholly without substance.

(2) The procedure adopted by the learned judge in this case was in fact the practice recommended in *Lee Koh Eng v PP*² and adopted ever since in the High Courts to avoid the very functus officio argument which was canvassed in this case.

(3) There is no merit in the complaint that the learned judge had directed the jury to reconsider their verdict at 8.08pm

A and indicated that they would have to stay the whole night until a verdict was reached. After the summing up in this case, it would be most undesirable to allow the jury to go home and to reconvene the next day for the verdict.

(4) In a case of the present nature where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury as to what other reasonable inferences could be drawn from each strand of circumstantial evidence and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at the guilt of the accused.

(5) The summing up of the learned trial judge on circumstantial evidence was manifestly inadequate so as to constitute a misdirection which has occasioned a miscarriage of justice in the circumstances of this particular case.

(6) The evidence excluded by the learned judge merely amounted to a bare denial and such evidence ought not to have been expunged. To deny the accused from putting his defence to the jury, however implausible it may appear, would most certainly occasion a miscarriage of justice particularly having regard to the weak nature of the prosecution's case.

Cases referred to

- 1 *Siew Kam Weng v PP* [1989] 3 MLJ 479 (fold)
- 2 *Lee Koh Eng v PP* [1975] 1 MLJ 132 (refd)
- 3 *Abdullah bin Saad v PP* [1956] MLJ 92 (refd)
- 4 *Jayaraman & Ors v PP* [1982] 2 MLJ 306 (fold)
- 5 *McGreevy v Director of Public Prosecutions* [1973] 1 All ER 503 (fold)
- 6 *Ku Lip See v PP* [1982] 1 MLJ 194 (refd)
- 7 *PP v Lim Chen Len* [1981] 2 MLJ 41 (refd)
- 8 *Vasan Singh v PP* [1988] 3 MLJ 412 (fold)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 204(ii), 228, 234, 402A
Evidence Act 1950 s 114 illus (a)
Penal Code (FMS Cap 45) s 302

Appeal from: Federal Territory Criminal Trial No 13 of 1984 (High Court, Kuala Lumpur)

Bachan Singh (Kartar Singh with him) for the appellant.
Stanley Isaacs (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

[Perayu telah dibicarakan oleh juri dan didapati salah melakukan pembunuhan dengan keputusan majoriti lima kepada dua dan ia telah disabitkan kesalahan itu dan dihukum mati. Di dalam rayuan, tiga hujah pokok telah ditimbulkan dan dipertimbangkan: (a) di perbicaraan itu selepas juri telah keluar untuk mempertimbangkan keputusan mereka pada pukul 5.57 petang, ketua para juri telah memberitahu hakim pada pukul 8.08 malam bahawa juri telah mencapai keputusan dengan majoriti empat kepada tiga dan hakim telah meminta juri keluar semula untuk pertimbangan selanjutnya. Hanya selepas juri itu telah keluar pada kali yang kedua mereka memberi keputusan bahawa si tertuduh didapati salah membunuh dengan majoriti lima kepada dua dengan mana hakim telah bersetuju. Peguambela perayu

menghujah oleh kerana juri telah membuat keputusan dengan majoriti empat kepada tiga pada kali yang pertama, mereka telah 'functus officio' (terputus kuasa) dan oleh kerana itu keputusan mereka memutuskan si tertuduh bersalah adalah terbatal. Ada disebut juga di dalam petisyen rayuan bahawa hakim yang arif telah mendorong juri membuat keputusan mereka apabila beliau memberitahu mereka bahawa mereka hendaklah bersidang sepanjang malam hingga keputusan dicapai; (b) arahan yang diberi kepada juri mengenai keterangan ikut keadaan adalah kurang atau tidak mencukupi; (c) hakim yang arif telah tersilap apabila beliau memutuskan bahawa keterangan penafian semata-mata oleh si tertuduh tidak boleh diterima atas alasan bahawa ia adalah pembelaan alibi dan oleh kerana itu tidak boleh diterima jika notis tidak disampaikan kepada pihak pendakwa di bawah s 402A Kanun Acara Jenayah.

Diputuskan, membenarkan rayuan si tertuduh:

(1) Oleh kerana kehendak nyata di bawah s 204(ii) Kanun Acara Jenayah iaitu keputusan majoriti tidak boleh kurang dari lima kepada dua, apa yang kurang dari itu tidak menjadi keputusan di sisi undang-undang. Oleh kerana itu, apabila para juri memberitahu bahawa mereka telah mencapai keputusan dengan majoriti empat kepada tiga, hakim yang arif memang berhak menyelesaikan perkara itu dengan meminta mereka keluar untuk pertimbangan selanjutnya dibawah s 228 Kanun Acara Jenayah. Hujah 'functus officio' itu adalah tidak beralasan sama sekali.

(2) Acara yang diikuti oleh hakim yang arif adalah amalan yang disyorkan di dalam kes *Lee Koh Eng Iwn Pendakwa Raya*² dan yang telah diikuti selepas itu oleh Mahkamah Tinggi untuk mengelakkan hujah functus officio yang sama seperti yang dikemukakan di dalam kes ini.

(3) Tidak ada alasan bagi aduan bahawa hakim yang arif telah mengarahkan para juri mempertimbangkan semula keputusan mereka pada pukul 8.08 malam dan memberitahu mereka mungkin terpaksa bersidang sepanjang malam hingga keputusan dibuat. Selepas penggulungan dan arahan dibuat di dalam kes ini, tidaklah diingini mereka dibenarkan balik ke rumah masing-masing dan bersidang semula pada esok harinya untuk membuat keputusan.

(4) Di dalam kes seperti ini di mana dari butir-butir keterangan ikut keadaan boleh dibuat lebih dari satu kesimpulan, tidak mencukupi bagi hakim yang membicarakan kes itu hanya menyenaraikan keterangan tidak langsung itu. Ia hendaklah mengambil satu langkah lagi dengan mengarahkan para juri apa kesimpulan-kesimpulan lain boleh dibuat dari tiap-tiap butir keterangan ikut keadaan itu dan menyerahkan kepada para juri untuk memutuskan apa kesimpulan yang mereka hendak terima. Hanya jika kekuatan gabungan semua kesimpulan yang diterima oleh para juri apabila dicampurkan atau dipintalkan adalah cukup untuk menjadi bukti hingga tidak ada keraguan yang munasabah, barulah boleh keputusan dicapai mengenai kesalahan si tertuduh.

(5) Arahan yang diberi oleh hakim yang arif mengenai keterangan ikut keadaan jelas tidak mencukupi dan ini menjadikannya salah arahan yang membangkitkan ketidakadilan di dalam keadaan kes ini.

(6) Keterangan yang diputuskan tidak boleh diterima oleh hakim yang arif adalah keterangan penafian semata-mata dan keterangan itu tidak sepatutnya ditolak. Bila si tertuduh tidak diberi peluang mengemukakan pembelaannya kepada para juri, sungguhpun ia dipandang tidak munasabah, tentulah ketidakadilan telah berlaku, lebih-lebih lagi memandangkan keterangan yang dikemukakan oleh pihak pendakwa tidak begitu kuat.]

A Mohamed Azmi SCJ (delivering the judgment of the court): The appellant was tried by jury in the Kuala Lumpur High Court and found guilty of murder by a majority verdict of five to two, and he was convicted and sentenced to death on 10 April 1987. The charge preferred against him was in the following terms:

B That you on 3 October 1983, between 5 pm and 6 pm beside an unnumbered house near the Lin Lum Crematorium, No 2, Lorong Kerayong, Kuala Lumpur, in the Federal Territory of Kuala Lumpur, did commit murder by causing death of one Chan Yee Mai and that you have thereby committed an offence punishable under section 302 of the Penal Code.

C There are numerous grounds of appeal, but we need only deal with three major arguments which in our view merit consideration.

The first principal complaint relates to the circumstances leading to the majority verdict of guilty being returned by the jury which according to learned counsel **D** for the appellant would render the guilty verdict null and void. It is on record that when the learned judge began his summing up to the jury on the last day of the trial, it was already past the normal office hours. The jury retired to consider their verdict at 5.57pm and when the court reconvened at 8.08pm, the foreman informed the judge **E** that the jury had come to a four to three decision, whereupon the learned judge invoked s 228 of the CPC and required the jury to retire again for further consideration. It was only after the jury had retired for the second time that they returned a verdict of guilty of murder by a majority of five to two, to which the learned judge concurred. **F** It was strenuously argued that since the jury had already decided by a majority of four to three in the first instance, they became functus officio and as such the verdict by which the accused was found guilty was a nullity. There is also an allegation in the petition of appeal that the learned judge had pressurized the jury to come to a verdict by telling them that they would have to stay in court the whole night until a verdict was reached. **G**

In our view, the functus officio argument is wholly without substance. In *Siew Kam Weng v PP*¹ at p 481, this court had the occasion to express an opinion on s 204 of the **H** CPC. We wish to reiterate that because of the express requirement under s 204(ii) that a majority verdict of the jury must not be less than five to two, anything less cannot constitute a verdict in law. Accordingly, when the jury in the case before us had indicated that they had reached a decision by a majority of four to three, the learned judge **I** was perfectly entitled to resolve the deadlock by requiring them to retire for further consideration under s 228 of the CPC before exercising his discretion to discharge them under s 234, should they continue to disagree on a verdict. Secondly, the authority of *Lee Koh Eng v PP*² relied upon by learned counsel for the appellant for the argument that the jury was functus officio after they had returned a

majority verdict of four to three, was a case decided in Penang under the Straits Settlement CPC, in particular with reference to s 193 which was not in pari materia with s 204(ii) of the Federated Malay States CPC. Section 193 (SS Cap 21) merely provided that the jury should consist of seven persons. Whereas s 204(ii) (FMS Cap 6) goes further by providing that 'The verdict returned shall be unanimous or by a majority of not less than five to two.' Thus, in *Lee Koh Eng*,² the jury had in fact returned a verdict of guilty of murder by a majority of four to three in the first instance, before they subsequently returned a similar verdict by a majority of five to two. Whereas, in the instant case, because of the manner of the questions put to the foreman, the jury did not announce whether their earlier four to three majority decision was one of guilty or otherwise. What learned counsel for the appellant has failed to appreciate is that the procedure adopted by the learned judge was in fact the practice recommended by Gill CJ in *Lee Koh Eng*² and adopted ever since in the High Courts to avoid the recurrence of the very *functus officio* argument which learned counsel is now canvassing. The foreman of the jury in this case had merely informed the court that they had come to a four to three decision without stating what the verdict was, and the learned judge thereupon required the jury to retire for further consideration under s 228 of the CPC. We, accordingly, reject the *functus officio* argument.

Before leaving this subject, we would like to commend the learned judge for sitting late in the evening instead of adjourning the trial to the next day after he had concluded his summing up to the jury. After the summing up, it would be most undesirable to allow the jury to go home and to reconvene the next day for their verdict. In the circumstances, if the learned judge had told the jury that they might have to stay the whole night until a verdict was reached, it could not be construed as pressurizing the jury, for the judge was merely stating a fact. In the event, there is no merit in ground 3 of the petition of appeal on the complaint that the learned judge had directed the jury to reconsider their verdict at 8.08pm and indicated that they would have to stay the whole night until a verdict was reached.

We now proceed to consider the more substantial grounds of appeal on the adequacy or sufficiency of the directions given to the jury on the subject of circumstantial evidence to connect the accused with the crime of murder. This particular issue requires serious consideration because the case of the prosecution against the accused was wholly based on circumstantial evidence. There was no evidence that the accused was with the deceased around the time she was brutally attacked. In his summing up, the learned judge had tabulated various strands of evidence, the combined effect of which would, according to the directions, be sufficient to prove that it was the accused who had inflicted the fatal injuries on the de-

A ceased on 3 October 1983 between 5pm and 6pm. The jury was directed to consider the following seven circumstantial evidence:

- (1) There was close proximity between the place where the deceased was found and the building in which the accused had a room.
- B (2) The chopper (exh P6) that was used to inflict the fatal injuries on the deceased was found in the building in which the accused had a room.
- (3) The accused was the owner of the chopper (exh P6), having bought it from Ying Chee Wah (PW10), an assistant shopkeeper, in September 1983, ie about one month prior to the murder. In addition, the deposition of Wong Moi Sun, the daughter of Wong Kuan Ying (PW8), one of the caretakers of the crematorium, was read in court to the effect that about two weeks prior to the crime, she saw the accused using the chopper when he was cooking.
- C (4) The chopper when recovered was wrapped with a piece of paper torn from newspaper (exh P19) found in the building.
- D (5) Cardboard sleeves (exh P10) for the chopper was found in the accused's room on a table, subsequent to his arrest.
- E (6) The accused lived alone in the building.
- (7) The accused and the deceased knew each other prior to the incident.

In a case of the present nature, where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt.

F It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at the guilt of the accused. Thus, in *Abdullah bin Saad v PP*,³ the fact that the accused pawned some jewellery belonging to the deceased a day after the killing could not by itself be sufficient evidence to form a conviction of a murder under illus (a) of s 114 of the Evidence Act 1950. Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.

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It must be noted at this point that since *Jayaraman & Ors v PP*,⁴ the then Federal Court had applied *McGreevy v Director of Public Prosecutions*,⁵ by holding that a trial judge's direction to the jury on burden of proof is the same whether the prosecution's evidence is direct or circumstantial, ie proof beyond reasonable doubt. Where the evidence is circumstantial, there is no further duty on the judge as in the past, to direct the jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to proof beyond reasonable doubt. But be that as it may, these authorities do not relieve the trial judge from the duty to make a balanced direction to the jury on other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused.

In this particular case, the only real evidence connecting the accused with the crime was the chopper (exh P6), a made in Japan 'Fish Brand' common kitchen knife, which could probably be purchased from any shop. Although there was sufficient evidence to show that P6 was the murder weapon, there was no evidence that it was in fact the one purchased by the accused from PW10 about a month prior to the incident. Indeed PW10 was unable to answer in cross-examination that P6 could merely be similar to the knife sold to the accused. Nor is there evidence that the accused had handled P6, let alone used it against the deceased, on that particular day. Since P6 might be similar only to the chopper bought by the accused, the deposition of Wong Moi Sun that she saw the accused using a similar knife to P6 whilst cooking about two weeks prior to the incident, could not have improved the prosecution's case any further than the fact that the accused had purchased a knife for a perfectly legitimate purpose. The accused denied that P6 was his but even assuming for one moment that the murder weapon belonged to the accused, in our view, the learned judge failed to instruct the jury sufficiently that police investigation had found nothing on the chopper to incriminate the accused. The jury was only directed that both the blood stains and the two strands of hair found on the chopper matched those of the deceased. But the jury was not asked to consider what inference could be drawn from the fact that there was no evidence at all to show that the accused had handled the murder weapon. Police investigation revealed that his finger prints were not found on the chopper. The jury was also not asked to consider what inference could be drawn from the fact that although the accused was arrested within 12 hours of the incident, no blood stain or other incriminating matter was found on his clothing or his body, notwithstanding the fatal slash wounds and fractures inflicted on the deceased. In our judgment, merely to direct the jury to consider whether the murder weapon belonged to the accused without anything more to connect him with the commission of the

A crime would render the summing up on this particular circumstantial evidence a misdirection. There is no presumption in law that the owner of a murder weapon is the murderer.

The other material factor which the jury was not sufficiently directed on is the fact that the scene of the crime was a religious complex, with a crematorium, a temple for vegetarians and a common cooking place. According to Wong Kuan Ying (PW8), one of the caretakers, the accused was a general worker there and he lived alone in a hut used as a store room near the crematorium. It seems clear from the evidence that the whole complex including the store room occupied by the accused were accessible to others including the caretakers. In our view, the failure to put this matter clearly to the jury for their consideration is a major flaw in the summing up of the learned judge when dealing with the various circumstantial evidence. Merely stating that the accused was staying in close proximity with the place where the deceased was found without mentioning the accessibility of the place to others would certainly give the impression that only the accused and no one else had access to the building and this would clearly be a misdirection. There was no motive for the killing and the jury ought in the circumstances to have been asked expressly to consider whether anyone else who had access to the complex could have committed the crime. The learned judge merely pointed out that the murder weapon P6 and the newspapers were found in the store area of the building and that the door to the store area was not locked, without stating what inference could be drawn from such fact. Again, the learned judge merely pointed out that the cardboard sleeve to the chopper was found on a table in the accused's room on the second visit by Inspector Soh to the scene of crime, but the jury was not told what inference could be drawn from the fact that if the incriminating sleeve had been there on the table all the time, why was it not seized at the time of the accused's arrest? Why was it found only subsequently on a second visit, especially when the accused's room was never locked between the arrest and the discovery?

If the jury had been properly directed to consider the issue of accessibility of the whole complex including the room of the accused, and also of the absence of incriminating evidence on the murder weapon to connect the accused with the crime, it cannot be said with reasonable certainty what the verdict of the jury might have been, particularly in a case where they appeared to have considerable difficulty in arriving at a verdict. The issue of accessibility would also affect the discovery by the police of the newspaper from the complex, part of which had been torn off to wrap up the murder weapon and also to the other strands of circumstantial evidence.

In our judgment, the summing up of the learned trial judge on circumstantial evidence was manifestly inade-

quate so as to constitute a misdirection which had occasioned a miscarriage of justice in the circumstances of this particular case.

The other unsatisfactory aspect of this case was the ruling by the learned judge to exclude the evidence of bare denial by the accused on the ground that it constituted a defence of alibi and was therefore not admissible in the absence of notice served on the prosecution under s 402A of the CPC. The evidence expunged by the learned judge is now reproduced:

I worked until 11 am. At this time, I found my zinc building too warm and I decided to come down to Pudu Raya. I then went to the City Lights later for the 3pm show. After that I went for my dinner in the town. I reached home at about 8.30pm.

It is at this juncture that objection was taken by the DPP and after considering authorities in *Ku Lip See v PP*⁶ and *PP v Lim Chen Len*,⁷ the trial judge agreed that the evidence was inadmissible, being evidence in support of an alibi under s 402A. To be fair to all concerned, no one at the trial could have been aware of the decision of this court in *Vasan Singh v PP*⁸ where a distinction was made between evidence of bare denial and evidence in support of alibi in the testimony of an accused person. Where his evidence is a bare denial, it is not evidence in support of an alibi and as such no notice is required under s 402A of the CPC. It is rather unfortunate that the accused was interrupted too early in his testimony for the purpose of determining the true nature of his defence. But as the evidence now stood, we agree with learned counsel for the appellant that the evidence excluded merely amounts to a bare denial and such evidence ought not to have been expunged. To deny the accused from putting his defence to the jury, however implausible it may appear, would most certainly occasion a miscarriage of justice, particularly having regard to the weak nature of the prosecution's case.

We would therefore allow the appeal, quash the conviction and set aside the sentence of death. The appellant is acquitted and discharged.

Appeal allowed.

Solicitors: *Bachan & Kartar.*

Reported by *Prof Ahmad Ibrahim*

A Yew Wan Leong v Lai Kok Chye

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 02-173-89
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND
GUNN CHIT TUAN SCJJ
12 MARCH 1990

B *Civil Procedure — Pleadings — Claim on written contract — Judgment given on point not pleaded — Importance of pleadings — Agreement to settle matter*

Contract — Novation — Written contract for purchase of shares — Agreement to settle matter — Contracts Act 1950, s 63

C In this case, the plaintiff had brought an action against the defendant on a contract in writing by which the defendant had agreed to buy 100,000 shares for the total sum of \$350,000. On the execution of the contract, the defendant paid \$35,000 by way of deposit. The purchase was not completed and the plaintiff sold the shares for \$210,912.30. He claimed the sum of \$139,088 being agreed liquidated damages, that is the difference between the agreed and forced sale prices. The learned trial judge accepted the contention of the defendant that the plaintiff was not in possession of the 100,000 shares on the day of completion. He however noted and accepted the evidence of the plaintiff that the defendant had offered to pay \$70,000 in settlement of the matter. The learned trial judge held that if the parties to a contract had agreed to substitute a new contract or to rescind or alter it, the original contract need not be performed. He therefore held that the plaintiff was disentitled to sue on the original contract, and as he had made no claim in the alternative under the subsequent agreement, the learned judge was unable to award him \$35,000 under the new contract. He therefore dismissed the claim. The plaintiff appealed.

F **Held, allowing the plaintiff's appeal:**

(1) As the trial court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal must be allowed and the order of the learned judge in dismissing the plaintiff's claim be set aside.

G (2) As there was evidence which was accepted by the learned judge that the defendant had agreed to pay the plaintiff to settle the matter concerning the written contract entered into by them, and taking into account that \$35,000 deposit had been paid to the plaintiff earlier on, it was ordered that the defendant pay the plaintiff the sum of \$35,000 with interest.

H [Di dalam kes ini, plaintif telah membuat tuntutan terhadap defendan atas suatu kontrak bertulis dengan mana defendan telah berjanji hendak membeli 100,000 saham dengan harga \$350,000. Apabila kontrak itu dibuat defendan telah membayar \$35,000 sebagai cengkeram. Pembelian itu tidak disempurnakan dan plaintif telah menjual saham itu dengan harga \$210,912.30. Ia telah menuntut jumlah \$139,088 sebagai ganti rugi jumlah tertentu yang dipersetujui iaitu perbezaan antara harga yang dipersetujui dan harga jualan terpaksa itu. Hakim yang arif di dalam perbicaraan telah menerima hujah defendan bahawa plaintif tidak memiliki saham itu pada hari penyelesaian penjualan itu, akan tetapi beliau mencatatkan dan menerima keterangan plaintif bahawa defendan telah menawarkan \$70,000 untuk menyelesaikan perkara itu. Hakim yang arif berpendapat jika pihak-pihak kepada sesuatu kontrak telah bersetuju menggantikannya dengan kontrak baru atau membatalkan atau mengubahnya, kontrak yang asal itu tidak boleh lagi dilaksanakan. Oleh kerana itu, beliau berpendapat plaintif tidak berhak menun-